

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 12, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

AIMEE S.,¹

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

No. 1:21-CV-03041-ACE

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REMANDING FOR
ADDITIONAL PROCEEDINGS

ECF Nos. 16, 18

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 16, 18. Attorney D. James Tree represents Aimee S. (Plaintiff); Special Assistant United States Attorney Jeffrey Staples represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

JURISDICTION

Plaintiff protectively filed an application for Disability Insurance Benefits and Supplemental Security Income on June 28, 2018, alleging disability since February 1, 2018 due to cervical degeneration, fibromyalgia, chronic headaches, right and left knee pain, and osteoarthritis.² Tr. 351-68, 202. The applications were denied initially and upon reconsideration. Tr. 254-60, 262-75. Administrative Law Judge (ALJ) Glenn G. Meyers held a hearing on April 14, 2020, Tr. 42-70, and issued an unfavorable decision on May 6, 2020. Tr. 15-33. Plaintiff requested review by the Appeals Council and the Appeals Council denied the request for review on January 14, 2021. Tr. 1-6. The ALJ's 2020 decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on March 11, 2021. ECF No. 1.

STANDARD OF REVIEW

The ALJ is tasked with “determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ

² Plaintiff previously filed for disability and supplemental security income benefits in April 2006. *See* Tr. 75. At a May 2009 hearing before an ALJ, Plaintiff requested a closed period of disability from March 2003 through May 2008. *Id.* Her claim was denied by the ALJ in a decision dated June 2009. Tr. 72-89. Her claim was remanded to the Agency by this Court in October 2012 and again in September 2016. Tr. 95-117, 153-84. In a decision dated June 18, 2018, an ALJ granted Plaintiff's requested closed period of disability, finding she was disabled from March 2003 through May 2008. Tr. 190-201.

1 may be reversed only if it is not supported by substantial evidence or if it is based
 2 on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
 3 evidence is defined as being more than a mere scintilla, but less than a
 4 preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant
 5 evidence as a reasonable mind might accept as adequate to support a conclusion.
 6 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison*
 7 *Co. v. NLRB*, 305 U.S. 197, 229 (1938)). If the evidence is susceptible to more
 8 than one rational interpretation, the Court may not substitute its judgment for that
 9 of the ALJ. *Tackett*, 180 F.3d at 1098; *Morgan v. Comm'r of Soc. Sec. Admin.*,
 10 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
 11 administrative findings, or if conflicting evidence supports a finding of either
 12 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
 13 *Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987). Nevertheless, a decision supported
 14 by substantial evidence will be set aside if the proper legal standards were not
 15 applied in weighing the evidence and making the decision. *Browner v. Sec'y of*
 16 *Health and Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).

17 SEQUENTIAL EVALUATION PROCESS

18 The Commissioner has established a five-step sequential evaluation process
 19 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 20 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
 21 four the claimant bears the burden of establishing a prima facie case of disability.
 22 *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes
 23 that a physical or mental impairment prevents the claimant from engaging in past
 24 relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot
 25 perform past relevant work, the ALJ proceeds to step five, and the burden shifts to
 26 the Commissioner to show (1) that the claimant can perform other substantial
 27 gainful activity and (2) that a significant number of jobs exist in the national
 28 economy which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1497-1498

1 (9th Cir. 1984); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a claimant
2 cannot make an adjustment to other work, the claimant will be found disabled. 20
3 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

4 ADMINISTRATIVE FINDINGS

5 On May 6, 2020 the ALJ issued a decision finding Plaintiff was not disabled
6 as defined in the Social Security Act. Tr. 15-33.

7 At step one, the ALJ found Plaintiff, who meets the insured status
8 requirements of the Social Security Act through December 31, 2023, had not
9 engaged in substantial gainful activity since her alleged onset date. Tr. 20.

10 At step two, the ALJ determined Plaintiff had the following severe
11 impairments: fibromyalgia, degenerative joint disease, degenerative disc disease,
12 obesity, depressive disorder, anxiety disorder, and substance addiction disorder.
13 Tr. 21.

14 At step three, the ALJ found Plaintiff did not have an impairment or
15 combination of impairments that met or medically equaled the severity of one of
16 the listed impairments. *Id.*

17 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
18 she could perform sedentary work, with the following nonexertional limitations:

19
20 [Plaintiff] can occasionally stoop and crouch; she cannot crawl, kneel, or
21 climb ramps, stairs, ropes, ladders, and scaffolds; she can engage in
22 unskilled, repetitive, routine tasks in 2-hour increments; she can have no
23 contact with the general public; she can work in proximity to but not in
24 coordination with co-workers; she can have occasional contact with
supervisors; she will be 10 [percent] less productive than the average worker
in the workplace; and she will be absent from work 6 times per year.

25 Tr. 22.

26 At step four, the ALJ found Plaintiff was unable to perform past relevant
27 work. Tr. 26.

1 At step five, the ALJ found that, based on the testimony of the vocational
 2 expert, and considering Plaintiff's age, education, work experience, and RFC,
 3 Plaintiff could perform jobs that existed in significant numbers in the national
 4 economy, including the jobs of assembler, escort vehicle driver, and document
 5 preparer. Tr. 26-27.

6 The ALJ thus concluded Plaintiff was not under a disability within the
 7 meaning of the Social Security Act at any time from at any time from the alleged
 8 onset date through the date of the decision. Tr. 28.

9 ISSUES

10 Plaintiff seeks judicial review of the Commissioner's final decision denying
 11 her disability insurance benefits under Title II and Title XVI of the Social Security
 12 Act. The question presented is whether substantial evidence supports the ALJ's
 13 decision denying benefits and, if so, whether that decision is based on proper legal
 14 standards. Plaintiff raises the following issues for review (1) whether the ALJ
 15 properly evaluated the medical opinion evidence; (2) whether the ALJ conducted a
 16 proper step-two analysis; (3) whether the ALJ properly evaluated Plaintiff's
 17 symptom complaints; (4) whether the RFC is consistent with disability; and (5)
 18 whether the ALJ met his step five burden. ECF No. 16 at 2.

19 DISCUSSION

20 A. Medical Opinions

21 Plaintiff contends the ALJ erred by not properly assessing the medical
 22 opinions of Patrick Metoyer, Ph.D., Michael Regets, Ph.D., and Matthew Comrie,
 23 Psy.D. ECF No. 16 at 15-17.

24 For claims filed on or after March 27, 2017, new regulations apply that
 25 change the framework for how an ALJ must evaluate medical opinion evidence.
 26 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL
 27 168819, 82 Fed. Reg. 5844-01, (Jan. 18, 2017); 20 C.F.R. §§ 404.1520c, 416.920c.
 28 The new regulations provide the ALJ will no longer give any specific evidentiary

1 weight to medical opinions or prior administrative medical findings. *Revisions to*
2 *Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. §§
3 404.1520c(a), 416.920c(a). Instead, the ALJ must consider and evaluate the
4 persuasiveness of all medical opinions or prior administrative medical findings
5 from medical sources. 20 C.F.R. §§ 404.1520c(a) and (b), 416.920c(a) and (b).
6 The factors for evaluating the persuasiveness of medical opinions and prior
7 administrative findings include supportability, consistency, the source's
8 relationship with the claimant, any specialization of the source, and other factors
9 (such as the source's familiarity with other evidence in the file or an understanding
10 of Social Security's disability program). 20 C.F.R. §§ 404.1520c(c)(1)-(5),
11 416.920c(c)(1)-(5).

12 Supportability and consistency are the most important factors, and the ALJ
13 must explain how both factors were considered. 20 C.F.R. §§ 404.1520c(b)(2),
14 416.920c(b)(2). The ALJ may explain how he or she considered the other factors,
15 but is not required to do so, except in cases where two or more opinions are equally
16 well-supported and consistent with the record. *Id.* Supportability and consistency
17 are explained in the regulations:

18
19 (1) *Supportability*. The more relevant the objective medical evidence
20 and supporting explanations presented by a medical source are to
21 support his or her medical opinion(s) or prior administrative medical
22 finding(s), the more persuasive the medical opinions or prior
administrative medical finding(s) will be.

23 (2) *Consistency*. The more consistent a medical opinion(s) or prior
24 administrative medical finding(s) is with the evidence from other
25 medical sources and nonmedical sources in the claim, the more
26 persuasive the medical opinion(s) or prior administrative medical
finding(s) will be.

27 20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2).
28

1 The Ninth Circuit recently addressed the issue of whether the new regulatory
2 framework displaces the longstanding case law requiring an ALJ to provide
3 specific and legitimate reasons to reject an examining provider's opinion. *Woods*
4 *v. Kijakazi*, 32 F.4th 785, 787 (9th Cir. 2022). The Court held that the new
5 regulations eliminate any hierarchy of medical opinions, and the specific and
6 legitimate standard no longer applies. *Id.* at 788-89, 792. The Court reasoned the
7 "relationship factors" remain relevant under the new regulations, and thus the ALJ
8 can still consider the length and purpose of the treatment relationship, the
9 frequency of examinations, the kinds and extent of examinations that the medical
10 source has performed or ordered from specialists, and whether the medical source
11 has examined the claimant or merely reviewed the claimant's records. *Id.* at 790,
12 792. Even under the new regulations, an ALJ must provide an explanation
13 supported by substantial evidence when rejecting an examining or treating doctor's
14 opinion as unsupported or inconsistent. *Id.* at 792.

15 *I. Dr. Metoyer*

16 In September 2018, Dr. Metoyer performed a mental evaluation and
17 provided an opinion on Plaintiff's level of functioning. Tr. 567-71. Dr. Metoyer
18 diagnosed her with panic disorder and major depressive disorder, recurrent and
19 moderate. Tr. 570. He opined Plaintiff appeared to have the ability to reason and
20 understand, had some adaption skills, and that her remote memory was intact, but
21 that her recent and immediate memory were mildly impaired. Tr. 571. He opined
22 her ability to sustain concentration and persistence were adequate based on the
23 evaluation, noting she described difficulty following through on tasks at home. *Id.*
24 He noted her report of "significant interpersonal challenges in her personal life and
25 prior work environment as a result of anxiety and mood symptoms," and opined
26 her ability to interact with coworkers and the public was "likely moderately
27 impaired." *Id.* He opined that due to her anxiety and mood symptoms and
28 tendency to isolate herself from others, her ability to maintain regular attendance in

1 the workplace was moderately impaired; and her ability to complete a regular
2 workday or workweek without interruption from anxiety and mood symptoms is
3 “likely moderately impaired.” *Id.* He opined her ability to deal with the usual
4 stress encountered in the workplace “is markedly impaired if it involved persistent
5 activity, complex tasks, task pressure, interacting with other individuals.” *Id.* He
6 also opined that if awarded benefits she “appears to require the assistance of a
7 payee at this time,” and he noted she appeared to have physical limitations that
8 would be better assessed by a medical provider. Tr. 570-71.

9 *2. Dr. Regets and Dr. Comrie*

10 In October 2018, Dr. Regets, a state agency psychological consultant,
11 reviewed Plaintiff’s records and rendered an opinion on her level of functioning.
12 Tr. 213-15. He opined she could sustain adequate concentration, persistence, and
13 pace to perform simple, routine, tasks and “more well-known or learned more
14 detailed tasks,” for up to two consecutive hours with normal breaks for a regular
15 eight-hour workday and 40-hour workweek. He opined Plaintiff would “do best in
16 a work setting that does not required frequent interaction with coworkers [and]
17 may have difficulties at times with attendance and punctuality but can perform
18 within acceptable workplace standards.” Tr. 214. He also opined she would “do
19 best in a work setting that does not require more than casual or incidental
20 interaction with the general public,” and in a stable, low pressure work setting with
21 clear expectations of the work to be performed. *Id.* In January 2019, Dr. Comrie
22 affirmed Dr. Regets’ opinion. Tr. 230-32.

23 The ALJ found the opinions of Dr. Metoyer, Dr. Regets, and Dr. Comrie
24 persuasive “given the lack on contrary allegation on [Plaintiff’s] part and lack of
25 conflicting opinion evidence.” Tr. 24. In a footnote, however, the ALJ also found
26 that “to the extent that Dr. Metoyer’s opinion is inconsistent” with the opinions of
27 the state agency reviewers, “I find [the state agency reviewers] opinions more
28 persuasive because their assessments were more specific and aligned with the

1 requirements of social security cases”; and “descriptors like mild, moderate, and
2 marked are not particularly appropriate or helpful in determining a [RFC].” *Id.*

3 Under the new regulations, supportability and consistency are the most
4 important factors to be considered in evaluating the persuasiveness of an opinion,
5 and the ALJ must explain how both factors were considered. 20 C.F.R. §§
6 404.1520c(b)(2), 416.920c(b)(2). The more relevant objective evidence and
7 supporting explanations that support a medical opinion, and the more consistent an
8 opinion is with the evidence from other sources, the more persuasive the medical
9 opinion is. 20 C.F.R. § 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2). Here, the ALJ
10 did not provide even a minimal articulation of how these factors were considered;
11 the ALJ summarizes the psychologists’ opinions but does not provide any analysis.
12 *See* Tr. 23-24. For example, there is no analysis or discussion of the examining
13 psychologist’s objective findings upon mental status exam, or the supporting
14 explanations of any of the psychologists, and no discussion of how the opinions
15 were consistent or inconsistent with each other or the record as a whole. *Id.*

16 Additionally, the ALJ’s findings are contradictory. First, the ALJ indicates
17 he finds all the opinions persuasive because of a “lack of conflicting opinion
18 evidence.” Tr. 24. However, in a footnote he finds that “to the extent that Dr.
19 Metoyer’s opinion is inconsistent” with the state agency opinions, the opinions of
20 Dr. Comrie and Dr. Regets are more persuasive. *Id.* n.1. The ALJ notes this is
21 because the state agency opinions are more “specific” and “aligned with the
22 requirements of Social Security cases” than Dr. Metoyer’s opinion, but does not
23 explain his conclusions. *See* Tr. 23-25. Review of Dr. Metoyer’s opinion, for
24 example, shows specific findings from his in-person evaluation, which included a
25 clinical interview and objective findings from a mental status exam, and he noted
26 he reviewed multiple treatment records as well. *See* Tr. 567-71. While his opinion
27 uses terms such as mild, moderate, and marked, Plaintiff points out that the state
28 agency providers use these and similar descriptors. ECF No. 16 at 16-17. Due to

1 the ALJ's lack of analysis, it is unclear whether the ALJ found Dr. Metoyer's
2 opinion consistent or inconsistent with the state agency opinions, and to what
3 extent.

4 Defendant argues the ALJ reasonably assessed the persuasiveness of the
5 medical opinions based upon their supportability and consistency with the record.
6 ECF No. 18 at 8. As explained *supra*, however, the ALJ provided brief and
7 contradictory findings concerning the opinion evidence, without discussion of the
8 factors required under the regulations or analysis of the medical opinions. This is
9 legally insufficient. Without the ALJ offering more than his stated conclusions,
10 the Court is unable to meaningfully review whether the ALJ's interpretation of the
11 evidence is reasonable. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir.
12 2015); *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988) (requiring the ALJ
13 to identify the evidence supporting the found conflict to permit the Court to
14 meaningfully review the ALJ's finding).

15 Defendant also contends that there is no conflict for the court to resolve, as
16 the ALJ found the opinions of Dr. Metoyer and the state agency reviewers equally
17 persuasive, and also found Dr. Metoyer's entire opinion persuasive. ECF No. 18 at
18 10-11. This is not clear from the ALJ's findings, as he found there was not
19 conflicting opinion evidence, yet also suggested Dr. Metoyer's opinion was in
20 conflict with the state agency psychologists. While Defendant offers an analysis of
21 the evidence, including that the ALJ found Dr. Metoyer's entire opinion persuasive
22 for reasons including that it was consistent with the opinion of the state agency
23 psychologists, ECF No. 18 at 11, ALJ did not offer such analysis, and thus the
24 Court will not consider the *post hoc* rationalization. *See Orn v. Astrue*, 495 F.3d
25 625, 630 (9th Cir. 2007) (The Court will "review only the reasons provided by the
26 ALJ in the disability determination and may not affirm the ALJ on a ground upon
27 which he did not rely.").

1 The ALJ erred in failing to analyze the persuasiveness of the medical
 2 opinion evidence under the factors required by the regulations, and his findings
 3 concerning the medical opinions of Dr. Metoyer, Dr. Comrie, and Dr. Regets are
 4 not supported by substantial evidence. Upon remand the ALJ is instructed to
 5 reconsider all medical opinion evidence under the factors required by the
 6 regulations, and to incorporate the opinions into the RFC or give reasons supported
 7 by substantial evidence to reject them.

8 **B. Step Two**

9 Plaintiff contends the ALJ erred at step two by not properly assessing
 10 Plaintiff's migraines or hand limitations. ECF No. 16 at 17. At step two of the
 11 sequential evaluation process, the ALJ must determine whether the claimant has
 12 any severe medically determinable impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
 13 416.920(a)(4)(ii). A medically determinable impairment "must result from
 14 anatomical, physiological, or psychological abnormalities that can be shown by
 15 medically acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. §§
 16 404.1521, 416.921. An impairment is "not severe" if it does not "significantly
 17 limit" the ability to conduct "basic work activities." 20 C.F.R. §§ 404.1522,
 18 416.922(a). "An impairment or combination of impairments can be found not
 19 severe only if the evidence establishes a slight abnormality that has no more than a
 20 minimal effect on an individual's ability to work." *Smolen v. Chater*, 80 F.3d 1273,
 21 1290 (9th Cir. 1996) (internal quotation marks omitted). The claimant bears the
 22 burden of demonstrating that an impairment is medically determinable and severe.
 23 *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

24 Step two is a de minimus screening device to dispose of groundless claims.
 25 *Smolen*, 80 F.3d at 1290. "Thus, applying our normal standard of review to the
 26 requirements of step two, [the Court] must determine whether the ALJ had
 27 substantial evidence to find that the medical evidence clearly established that
 28 [Plaintiff] did not have a medically severe impairment or combination of

1 impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). SSR 19-4p,
2 *Evaluating Cases Involving Primary Headache Disorders*, effective at the time of
3 the ALJ’s decision, provides guidance on how to evaluate primary headache
4 disorders. SSR 19-4p, 2019 WL 4169635 (Aug. 26, 2019).

5 Here the ALJ found “while [Plaintiff] alleges headaches/migraines, I do not
6 consider this condition to be a separate medically determinable impairment given
7 the lack of objective evidence.” Tr. 21. Plaintiff contends the ALJ harmfully erred
8 by discounting Plaintiff’s migraines “given the lack of objective evidence” because
9 under the Agency’s own guidance found in SSR 19-4p, headaches may be assessed
10 based on a diagnosis and treatment records showing response to treatment or lack
11 thereof, both of which are in this record. ECF No. 16 at 18; *see* SSR 19-4p.
12 Defendant argues substantial evidence supports the ALJ’s step two finding because
13 step two was decided in Plaintiff’s favor, and the ALJ discussed all of Plaintiff’s
14 alleged limitations in assessing her RFC, including her complaints of headaches.
15 ECF No. 18 at 12-13.

16 The ALJ found headaches were not a medically determinable impairment
17 due to a lack of objective evidence. Tr. 25. SSR 19-4p explains that while an ALJ
18 may not establish the existence of an MDI based only on a diagnosis or a statement
19 of symptoms, a headache disorder may be assessed on a combination of findings
20 including a headache disorder diagnosis, observation of a typical headache event,
21 remarkable or unremarkable findings on laboratory tests, and response to
22 treatment. SSR 19-4p. Here, treatment records show diagnosis and treatment for
23 chronic headaches, including migraines and/or muscle tension headaches with
24 associated nausea, photophobia and sound sensitivity. *See e.g.*, Tr. 487, 541-42,
25 549, 567, 695-96. In July 2017, for example, providers documented increased
26 frequency of headaches, noting she reported about three a week that did not
27 respond to Imitrex, along with muscle tension headaches on the other days; her
28 provider noted nausea and light and sound sensitivity from headaches. Tr. 541.

1 Upon physical exam, her provider also observed tenderness over her entire
2 posterior neck and bilateral cervical spine. Tr. 542. While the ALJ concluded her
3 headaches “were not as severe or as frequent as she portrayed them” because she
4 did not take medication for headaches, Tr. 25, records show treatment has included
5 medications such as sumatriptan (Imitrex), nortriptyline, and daily Excedrin for
6 headaches. *See e.g.*, Tr. 446, 541, 546, 551. Additionally, while the ALJ
7 discounted the severity of her headaches because “medication was helpful for
8 improving her headaches after she had sought treatment for headaches in May
9 2019,” this conclusion is not supported by the record, which shows the medication
10 the ALJ refers to is an intravenous “migraine cocktail” administered in the
11 emergency room at one visit in May 2019. Tr. 695-97. There is no evidence she
12 regularly received such treatment, and in 2020 she testified she had headaches
13 about three times a week that were not controlled by Imitrex. Tr. 55-57.

14 While the ALJ found she reported “severe daily headaches to the agency”
15 and that this was inconsistent with reports to providers, the headache questionnaire
16 she returned to the agency in August 2018 shows she reported “almost daily”
17 headaches, noting the dates of her last three headaches as August 23rd, 25th and
18 August 27th. Tr. 445-46. This is consistent with her report to the consultative
19 examiner of headaches a couple times a week in September 2018, along with her
20 report in 2017 that she experienced migraines three times a week and muscle
21 tension headaches on other days. Tr. 541, 567. An ALJ must consider all of the
22 relevant evidence in the record and may not point to only those portions of the
23 records that bolster his findings. *See, e.g., Holohan v Massanari*, 246 F.3d 1195,
24 1207-08 (9th Cir. 2001) (holding that an ALJ cannot selectively rely on some
25 entries in plaintiff’s records while ignoring others). The ALJ’s finding that
26 Plaintiff’s headaches were not a medically determinable impairment is not
27 supported by substantial evidence.
28

1 Defendant argues any error is harmless because the step was resolved in
2 Plaintiff's favor. ECF No. 18 at 13. Plaintiff points out, however, that in finding
3 headaches were not a medically determinable impairment, as opposed to severe or
4 nonsevere, the ALJ did not consider headaches in the later steps of the sequential
5 analysis, including step three under the neurological disorder listings or the RFC.
6 ECF No. 16 at 18-19; *see also* SSR 96-8p. As the claim is being remanded to
7 reconsider the medical opinion evidence, discussed *supra*, the Court declines to
8 engage in harmless error analysis here.

9 Plaintiff also contends the ALJ erred by failing to address Plaintiff's hand
10 impairments at step two. ECF No. 16 at 19-20. As the case is being remanded to
11 readdress the medical opinion evidence and Plaintiff's headaches, the ALJ is
12 instructed on remand to reconsider the full medical record with the assistance of
13 medical expert testimony, and to reassess Plaintiff's medically determinable
14 impairments and whether they are severe at step two.

15 **C. Plaintiff's Subjective Statements**

16 Plaintiff contends the ALJ erred by improperly assessing Plaintiff's
17 subjective complaints. ECF No. 16 at 4-15. It is the province of the ALJ to make
18 determinations regarding a claimant's subjective statements. *Andrews*, 53 F.3d at
19 1039. However, the ALJ's findings must be supported by specific, cogent reasons.
20 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant
21 produces medical evidence of an underlying medical impairment, the ALJ may not
22 discredit testimony as to the severity of an impairment merely because it is
23 unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
24 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting
25 the claimant's testimony must be "specific, clear and convincing." *Smolen*, 80
26 F.3d at 1281; *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General
27 findings are insufficient: rather the ALJ must identify what testimony is not
28

1 credible and what evidence undermines the claimant's complaints." *Lester*, 81
2 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

3 The ALJ concluded Plaintiff's statements concerning the intensity,
4 persistence and limiting effects of her symptoms were not consistent with the
5 medical evidence and other evidence in the record. Tr. 23. The ALJ's evaluation
6 of Plaintiff's symptom claims and the resulting limitations largely relies on the
7 ALJ's assessment of the medical evidence. Having determined a remand is
8 necessary to reassess the medical opinion evidence and step two findings, any
9 reevaluation must necessarily entail a reassessment of Plaintiff's subjective
10 symptom claims. Thus, the Court need not reach this issue and on remand the ALJ
11 must also carefully reevaluate Plaintiff's symptom claims in the context of the
12 entire record. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) ("Because
13 we remand the case to the ALJ for the reasons stated, we decline to reach
14 [plaintiff's] alternative ground for remand.").

15 **D. RFC and Step Five findings**

16 Plaintiff also argues the RFC was consistent with disability and that the ALJ
17 failed to meet his step five burden. ECF No. 16 at 3-4, 20-21. As this case is
18 being remanded for the ALJ to reassess the medical opinion evidence and the step
19 two findings, the ALJ is instructed to perform the sequential analysis anew,
20 including reconsidering Plaintiff's RFC as well as the step five findings.

21 **CONCLUSION**

22 Plaintiff argues the decision should be reversed and remanded for the
23 payment of benefits. The Court has the discretion to remand the case for additional
24 evidence and findings or to award benefits. *Smolen*, 80 F.3d at 1292. The Court
25 may award benefits if the record has been fully developed and further
26 administrative proceedings would serve no useful purpose. *Id.* Remand is
27 appropriate when additional administrative proceedings could remedy defects.
28 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court

1 finds that further development, including medical expert testimony, is necessary
2 for a proper determination.

3 The ALJ's decision is not supported by substantial evidence and not free of
4 harmful error. On remand, the ALJ shall reevaluate the medical evidence of
5 record, perform the sequential analysis anew making findings on each of the five
6 steps of the sequential evaluation process, reassess the medical opinion evidence
7 and plaintiff's subjective complaints with the assistance of medical expert
8 testimony, and take into consideration any other evidence or testimony relevant to
9 Plaintiff's disability claim. Nothing herein should be read as a suggestion that any
10 particular decision or decisions on remand would be more appropriate than
11 another.

12 Accordingly, **IT IS ORDERED:**

13 1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is
14 **GRANTED.**

15 2. Defendant's Motion for Summary Judgment, **ECF No. 18**, is
16 **DENIED.**

17 3. The matter is **REMANDED** to the Commissioner for additional
18 proceedings consistent with this Order.

19 4. An application for attorney fees may be filed by separate motion.

20 The District Court Executive is directed to file this Order and provide a copy
21 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
22 the file shall be **CLOSED.**

23 DATED January 12, 2023.



A handwritten signature in blue ink, reading "Alexander C. Ekstrom", is written over a horizontal line.

ALEXANDER C. EKSTROM

UNITED STATES MAGISTRATE JUDGE